NO. 80-532

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In The Supreme Court of the United States

OCTOBER TERM

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, AND A. J. TAYLOR, SECRETARY OF THE FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

PETITIONERS

V

FLORIDA NURSING HOME ASSOCIATION, ET AL.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT NURSING HOMES

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INDEX

	PAGE
TABLE OF AUTHORITIES	ii
DISCUSSION	1
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

	PAGE
CASES:	
Alabama Nursing Home Association v. Harris 617 F.2d 388(5th Cir 1980)	3
Edelman v. Jordan, 415 U.S. 651 (1974)	4, 5, 6, 7, 9, 10, 11,
Florida Nursing Home Association v. Page, 616 F.2d 1355 (5th Cir 1980)	2, 3, 5, 6,
Golden Isles Convalescent Center, Inc., v. Califano 442 F.Supp 201 (S.D. Fla. 1977)	2, 3, 9
CONSTITUTION, STATUES AND REGULATIONS	
United States Constitution, Article VI	10, 11
United States Constitution, Eleventh Amendment	4, 5, 9, 10
42 U.S.C. 1396 (a)(13)(E)	2
41 Fed. Reg. 27305 (1976)	2

DISCUSSION

Since the filing of the Respondent nursing homes' Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, there has been filed a Supplemental and Reply Brief by the Petitioner State of Florida, three Amicus Curiae Briefs by twenty-five states in support of State of Florida's Petition for Certiorari, and a Brief for the Federal Respondent filed by the Solicitor General of the United States further supporting Florida's Petition for Certiorari. This intervening matter and argument was not available at the time of filing of the Respondent's Brief in Opposition. Therefore, this Supplemental Brief is filed pursuant to Rule 22.6 of the Rules of the United States Supreme Court (Eff. June 30, 1980)

At the time this Counsel filed the Complaint in Golden Isles Convalescent Center, Inc., v. Califano, 442 F. Supp. 201 (S.D. Fla. 1977) in October of 1976,[1] immediately after it was certain that the State of Florida had no intention of complying with Congress' statutory mandate to reimburse the Respondent nursing homes on a reasonable cost-related basis as of July 1, 1976, pursuant to 42 U.S.C. 1396 (a)(13)(E),[2] the Respondents determined that seeking

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1 For purposes of ruling on the retroactive reimbursement-Eleventh Amendment immunity issue, the Fifth Circuit consolidated the Golden Isles case name under the heading Florida Nursing Home case. See Florida Nursing Home Assoc. v. Page., 616 F.2d 1355, 1359 (5th Cir. 1980)

2 It was anticipated by Respondent nursing homes that shortly after the unexplained, delayed publication of HEW's final regulations for reasonable cost related-reimbursement on July 1, 1976, the State of Florida was one of the "good number of States [which] will be able to implement the greater part of these regulations fairly quickly...", (See Brief of Federal Respondent at 3 quoting 41 Fed.Reg. 27305 (1976) since the State of Florida had already been collecting cost-data from the Respondents since 1973 on State prepared forms. See also footnote 3 (b) infra.

extraordinary preliminary mandatory injunctive relief on the required basis of immediate and irreparable damage was not possible without extensive time consuming discovery which could not prove that the South Florida Nursing home industry doing business with Medicaid, would be immediately and irreparably destroyed.[3]

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[3] (a) Such a preliminary Motion for extraordinary relief would have engendered unnecessary fear and concern in the community and industry. In fact, to this date, despite consistent pressure from the industry, there has still been no trial on the facts of actual cost in the lower court proceedings of the Golden Isles and Florida Health Care Assoc. consolidated cases. These proceedings are currently pending District Court ordered submission of new findings by HHS of regulations for the proper determination of the costs of an efficient and economically operated nursing home. See Alabama Nursing Home Assoc. v. Harris, 617 F.2d 388 (5th Cir. 1980) and Golden Isles Convalescent Center, Inc. et. al. v. Califano, Order dated July 28, 1980, Judge W. H. Hoeveler, S.D. of Fla. Docket Case Nos. 76-1810, 77-559 Civ.

(b) Furthermore, just recently, in a status report filed December 16, 1980, from the Federal Respondent with the District Court, as to the new Florida Medicaid plan adopted pursuant to the District Court's Order of October 18, 1977, the Federal Respondent states: "...HHS has concluded that the Florida Title XIX Plan, in its present form does not meet Federal Statutory and regulatory requirements,..."

But it was precisely permanent mandatory injunctive relief that the Respondent's sought and obtained on October 18, 1977, after an entire year's delay due solely to the fact that the Federal Courts of the Southern District of Florida were faced with an incredible case over-load during 1976 and 1977 before the appointment of several new Federal District Judges. The South Florida industry acted as promptly and responsibly as legally possible in seeking protection of its rights utilizing all legal means possible.

In so doing, it became immediately apparent to the Respondents that the landmark case of Edelman v. Jordan 415 U.S. 651(1974) was dispositive of the Eleventh Amendment issues on both prospective and retroactive reasonable cost-related reimbursement. After careful reasoning, research and review, it became the sincere opinion of the Respondents that as to the issue of retroactive reimbursement-Eleventh Amendment immunity, experience had now shown the arguments of the four dissenters in the

Edelman v. Jordan decision, and then some, to be far more persuasive and coherent with reality than the majority's ruling.

Of course, only this United States Supreme Court could overrule its previous decision in the Edelman case and any request for an overruling of Edelman to the Federal District Court or the Fifth Circuit Court of Appeals would naturally and properly fall on deaf ears. Accordingly, this Counsel proffered the argument, among others, that the Edelman decision did not restrict retroactive reimbursement in this case because the State of Florida had expressly waived its Eleventh Amendment immunity for the reasons well briefed in the pending Briefs before the Court.

The Fifth Circuit Court's decision in Florida Nursing Home Assoc. v. Page, supra at 2, footnote 1, adopted this narrow argument of waiver and, in light of its inability to jurisdictionally overrule Edelman, even went so far as to state in its opinion that

> "a contrary holding in the circumstances of this case, where appellants Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1976, would achieve an inequitable result." Id at 1363.

Certainly, Judge Ainsworth and the Fifth Circuit Court were well familiar with Edelman and certainly had to know that because of the sensitivity and importance of its own ruling, it would be petitioned to this Supreme Court. The Respondents hereby submit that the Fifth Circuit was judiciously expressing its position that this Supreme Court strongly consider the overruling of Edelman v. Jordan supra and that is precisely why the Fifth Circuit included in its finding of waiver a reference to "inequitable result."

As victors in the Fifth Circuit, it would hardly be appropriate for the Respondents to support Certiorari review by this Court and accordingly, they objected to Florida's Petition for Certiorari on the issue of the soundness of the Fifth Circuit's valid finding of express waiver. It would be entirely illogical

and inconsistent for the Respondent nursing homes to ask this Court to overrule its decision in Edelman in a Brief objecting to this Court's basic exercise of Certiorari jurisdiction ab initio. Such argument and brief would only be appropriate if this Court were to accept Certiorari.

Despite this posture, what has now surfaced is an express request by the Federal Respondent that this Court accept Certiorari and then rule on the merits on a summary reversal basis pursuant to Rule 23.1 of the Rules of the United States Supreme Court since

> "The Respondent nursing homes and Nursing Home Association, in their briefs in opposition, have not offered any additional support for the Court of Appeals' ruling, and this Court's consideration of the disputed one-sentence contractual provision is not likely to be appreciably aided by further briefing and argument." Brief of Federal Respondents at 12.

This is not true.

The Respondent nursing homes have every intention of fully briefing and arguing the substantive merits of overruling Edelman v.

Jordan supra upon this Court's granting of Certiorari in addition to arguing the waiver ruling of the Fifth Circuit.

The simple possibility of summary reversal by this Court without the opportunity to fully brief and argue all the merits of the case themselves has an absolutely "chilling" effect on the Respondent nursing homes and seems to defy all basic standards of judicial review, due process and basic fair play.

In the American Bar Association Journal of recent November, 1980 date, in an article by Prof. Eugene Gressman entitled Supreme Court Practices: Circa 1980, it is noted that

> "This summary treatment of certiorari cases has been criticized frequently, particularly in light of the Court's admonition to keep all the preliminary certiorari papers as short as possible and to address only the 'cert-worthiness' of the case." Id at Volume 66, 1385,1389.

With great respect for this Court's time, the Respondent nursing homes have scrupulously complied with all of this Courts time, manner and color requirements under its new rules

and have taken all precautions to avoid long-winded dissertations of unnecessary scholarship in their jurisdictional objection briefs.[4] To punish them through Summary reversal would not only be a grave injustice to the Respondents, but the Court would rob itself of a most auspicious opportunity to more thoroughly examine its ill-conceived Edelman v. Jordan supra opinion and what that decision has wrought.

It has been well over six years since the Edelman decision was handed down by this Court, time for a decision's merit to be evaluated particularly in light of the ever-increasing speed and rapidity of modern American life. If this Court, after full briefing, challenge and argument, determines the majority decision to still be reasoned correctly, the Court and the country will have benefited from reassertion of the "impervious" logic of Edelman. If

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[4] In fact, in the related Florida Department of HRS et,al. v. Golden Isles Convalescent Center, Inc., et.al., petition for Certiorari, Case No. 80-85, cert denied October 6, 1980, the Respondent nursing homes filed only a waiver of objection letter.

however, the Court scrutinizes this important challenge and sees (i) that the Eleventh Amendment was never intended to supersede the Supremacy clause of the United States; (ii) that it is conflicting logic to jurisdictionally ignore the Eleventh Amendment for purposes of prospective Federal Court jurisdiction, but not for retroactive relief; (iii) that the negative ramifications of the Edelman decision is in conflict with the past history of relevant decisions by this Court, the Court and the country will have benefitted even more.

The importance of the Court's decision in this case must not be overlooked. We are fast coming upon "1984," and American government at all levels is growing bigger and bigger, faster and faster, and more incompetent and oppressive at every turn, while private enterprise, production and excellence are stymied in every corner and capital formation severely burdened.

The Eleventh Amendment as interpreted by this Court in Edelman v. Jordan supra, directly

and unintentionally promotes and protects incompetency in government and foisters intentional bureaucratic disregard of the rights of free enterprise. This fact costs the citizens of this great country billions of dollars in waste and inefficiency in State and Federal government while the taxable base of private industry is retarded. The potential risk from lawsuits based on statutorily created obligations are not only relatively di minimus, but are entirely predictable.[5] Without the Eleventh Amendment being interpreted by this Court as having given State government "carte blanche" freedom from responsibility from obvious violation of Federal laws, the Federal Congress and State legislatures would be forced to enact or participate in only those programs they

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[5] As the Brief of the Federal Respondent at page 12 points out: "The time period concerned is only 15 months, and the amount of money at stake is only the difference between one Medicaid payment rate and another." Florida, in collecting costs data from 1973, could estimate very well what actual costs would be during 1976-77; ergo, so could the Federal Respondent.

could truly afford and will force far greater professionalism and business efficiency in bureaucratic administration of statutory obligations. The result could only protect the public purse, not dilute it, and perhaps produce far greater respect by government for the risks private enterprise is faced with daily, particularly problems with government. This Court must now deal with the rights of free enterprise under the Constitution in much the same way that it has so successfully coped with the rights of individuals in the past.

Mr. Justice Rehnquist, in writing the majority opinion in Edelman v. Jordan supra, wisely quoted Mr. Justice Brandeis:

> "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." Id at 671, footnote 14, citing Burnet v. Coronado

Oil and Gas Co., 285 U.S. 393, 406-408 (1932) (dissenting opinion).

The question now posed is whether Justice Rehnquist and this Court have risen to the magnitude of Mr. Justice Brandeis to at least hear and see and to test the resiliency of their logic.

CONCLUSION

Wherefore, should this Court grant the State of Florida's Petition for Writ of Certiorari, it must do so on a plenary review in the interests of all concerned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This, the 31st day of December, 1980.

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